

Dong (Migration) [2020] AATA 5381 (18 December 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Wuyang Dong

VISA APPLICANT: Mr Zhengchi Cui

CASE NUMBER: 1803109

HOME AFFAIRS REFERENCE(S): 2017051439 OSF2017/051439

MEMBER: P. Maishman

DATE: 18 December 2020

PLACE OF DECISION: Perth

DECISION: The Tribunal affirms the decision not to grant the visa applicant a Child (Migrant) (Class AH) visa.

1.

Statement made on 18 December 2020 at 12:05pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 101 (Child) – bogus document or false or misleading information – adult dependent child – post-secondary study – document check – dates of study inconsistent with college’s records and signature non-genuine – sponsor’s knowledge that document was bogus – compassionate or compelling circumstances justifying grant of visa – sponsor’s Australian partner’s health – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65

Migration Regulations 1994 (Cth), r 1.03, Schedule 2, cl 101.223, Schedule 4, criterion 4020

CASES

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection on 29 November 2017 to refuse to grant the visa applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).
3. Mr Zhengchi Cui applied for the visa on 22 June 2017. He claims to be the dependent child of Ms Wuyang Dong who sponsored the applicant and is the review applicant. At the time of application, the Child (Migrant) (Class AH) visa contained Subclass 101 (Child), Subclass 102 (Adoption) and Subclass 117 (Orphan Relative). In this case, claims have only been made in respect of Subclass 101 (Child).
4. The criteria for a Subclass 101 visa are set out in Part 101 of Schedule 2 to the Migration Regulations 1994 (the Regulations). Relevantly to this case, they include cl.101.223 which requires Mr Cui to meet the public interest criteria.
5. The delegate refused to grant the visa on the basis that cl.101.223 was not met because the delegate was not satisfied Mr Cui met public interest criteria (PIC) 4020.
6. Ms Wuyang Dong appeared before the Tribunal on 17 December 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Zhengchi Cui, the visa applicant and Mr Gary Gracie, Ms Dong's husband.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The Tribunal had before it a copy of the Department's file containing the visa application and sponsorship form. Mr Cui claims to be the natural child of Ms Dong and was born in October 1994. Mr Cui claimed to have commenced a post-secondary course of study leading to a trade, vocational or professional qualification at Anshan Technician College in September 2015 with an estimated date of completion being July 2018. Ms Dong claims to be a Chinese citizen and permanent resident of Australia and to have arrived in January 2015. Ms Dong claims to be in a partner relationship with Gary Gracie who was born in 1956 and is an Australian citizen. The file contains documents the Department received in support of Mr Cui's application including, relevantly to this case, a Chinese student identification card and a typed letter dated 6 June 2017. These documents are at folios 39 to 43 of the file.
10. Ms Dong gave the Tribunal a copy of the delegate's decision record with her application for review. The delegate said the Department conducted checks to verify the authenticity of the student identity certificate and "School certificate" it received and were told the documents were not genuine. The Department invited Mr Cui to comment on its finding he had provided bogus documents and Ms Dong responded in writing on 28 September 2017. Ms Dong also gave the Tribunal a typed letter signed by her on 6 February 2018.
11. Prior to the hearing the Tribunal received a statutory declaration from Mr Gracie declared 10 December 2020, an email from Ms Dong dated 10 December 2020, and a further email from

Ms Dong on 16 December 2020 containing a copy of the *Immigration (Education) Amendment (Expanding Access to English Tuition) Bill 2020* and *Explanatory Memorandum*.

12. Clause 101.223 relevantly requires that the applicant satisfies public interest criteria PIC 4020.
13. PIC 4020(1) requires that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1).
14. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
15. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document was provided by the applicant knowingly or unwittingly. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen as defined in r.1.03, that justify the granting of the visa.
17. The issues for determination in this case are whether Mr Cui has given, or caused to be given, to the Department a bogus document or information that is false or misleading in a material particular, and if so, whether there are compelling circumstances affecting the interests of Australia; or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or ineligible New Zealand citizen to justify the granting of the visa.

Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?

18. The delegate's decision record says Mr Cui applied for the visa on 22 June 2017 and gave a student identity certificate and School certificate purporting to have been issued by the Anshan Technician College on 6 June 2017. The information in the documents correlates with the answer at Q 38 of the visa application form that Mr Cui was currently undertaking a post-secondary course of study leading to a trade, vocational or professional qualification that commenced on 1 September 2015 and was expected to be completed by 1 July 2018. The Department sought to verify the authenticity of the documents with the staff at Anshan Technician College and were advised Mr Cui commenced studying 'Installation and Maintenance of Intermediate Electrical Automation Equipment' on 1 March 2017 and the information in the documents was inconsistent with the records and the signature on the school certificate is not genuine.
19. The Department invited Mr Cui to respond to its preliminary conclusion that bogus documents had been given in relation to the application for the visa.
20. Ms Dong responded to the invitation by email on 28 September 2017 on Mr Cui's behalf. Ms Dong apologised for providing a certificate incorrectly stating a period of Mr Cui's enrolment at Anshan Technician College. Ms Dong wrote to the Tribunal on 10 December 2020 submitting her apology for the bogus documents.
21. The Tribunal gave Ms Dong a copy of the documents contained at folios 39 to 43 of the Department's file. Ms Dong agreed those documents were bogus and thinks they were created by someone unknown from Mr Cui's father's side of the family. Ms Dong acknowledges she knew the document was bogus.
22. Mr Cui gave oral evidence his visa application form was completed based on answers he gave and signed by him. Mr Cui said he declared the duration of the course to be from 2015 to 2018 because that is the usual time it takes. Mr Cui said he signed the application form and gave all the documents to his father who said he'd take care of everything. Mr Cui said his father got the student identity card. He said he was young at the time and did not know the document was false.
23. The phrase 'bogus document' for the purpose of PIC4020(1) is defined in s.5(1) of the Act and includes a document that the Minister reasonably suspects is counterfeit or which has been altered by a person who does not have authority to do so.
24. 'Counterfeit' is not defined in the Act. The Macquarie dictionary defines 'counterfeit' as 'an imitation made to pass as an original'.
25. The Department's policy manual PAM3 gives example of bogus documents and says documents that are counterfeit are documents that have been manufactured to resemble genuine documents.
26. The Tribunal is satisfied on the evidence of the parties that the documents at folios 39 to 43 of the Departments file are an imitation manufactured to resemble the genuine documents of the school. The Tribunal reasonably suspects this document is a bogus document.
27. The Tribunal finds that there is evidence that Mr Cui has given, or caused to be given, to the Minister or an officer, a 'bogus document', as defined in s.5(1) of the Act.
28. Therefore, the applicant does not meet PIC 4020(1).

29. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
30. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
31. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

Compelling circumstances affecting the interests of Australia

32. Mr Cui and Ms Dong made no claims there were compelling circumstances affecting the interests of Australia.
33. There is no evidence before the Tribunal, and the Tribunal so finds, that there are no compelling circumstances that affect the interests of Australia.

Compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or ineligible New Zealand citizen?

34. The Tribunal considered the written submissions of Ms Dong dated 28 September 2017, 6 February 2018 and 10 December 2020 and the oral evidence given at hearing. The Tribunal accepts that Ms Dong is regretful and apologetic for the provision of the bogus document. Ms Dong claims she did not know why the College did not provide confirmation her son was enrolled in 2015. Ms Dong claims Mr Cui is her only child because of China's one child policy. She says the decision to refuse the visa showed a lack of compassion and understanding for a mother wanting to reunite as a complete family and the psychological impact it has on her. The decision puts strain on her marriage. Her husband, Mr Gracie, has health issues and it distresses her to have to decide about staying in Australia to care for him, or going to China to look after her son. She says she and Mr Gracie's financial situation make it harder for her to visit China. Covid-19 has restricted their ability to travel. In the future her son will have a family and it is very hard for her to experience a normal relationship and she would not be able to interact with her grandchildren. Ms Dong's sister lives in Victoria with her family and her son misses the opportunity for family gatherings as is the Australian way. Ms Dong has not accessed any professional assistance for stress and does not suffer ongoing health problems.
35. The Tribunal considered the email from Ms Dong on 16 December 2020 submitting Australian legislation she claims support her contention the Department were wrong to dismiss the relevance of her son's enrolment in an English language course. The Tribunal asked Ms Dong to explain why a bogus document was necessary if her son was doing a course that met the requirements. Ms Dong responded she didn't know why the College had not provided her son's 2015 enrolment in the records. There is no evidence before the Tribunal that the English language course Ms Dong claims her son participated in was a post-secondary course of study leading to a trade, vocational or professional qualification. The Tribunal does not accept Ms Dong's submission.

36. The Tribunal acknowledges Ms Dong's contrition for the provision of bogus documents. The Tribunal is sympathetic to her desire to be reunited with her son. The Tribunal does not accept Ms Dong did not know why the college could not confirm her son was enrolled in 2015. Ms Dong gave evidence the College told her he was only enrolled for 22 days in 2015 and that did not meet the requirements for them to list an enrolment. Ms Dong has no medical or psychological issues.
37. Mr Cui told the Tribunal that his father could not financially support him so he wanted to live with his mother. He said there were no health reasons for Ms Dong to need him to be in Australia. He said he spent so much time with his mother's sister when he was young that he would like to be reunited with the family.
38. The Tribunal does not consider the circumstances raised by Mr Cui constitute compelling or compassionate circumstances.
39. The Tribunal considered the evidence of Mr Gary Gracie contained in his statutory declaration dated 10 December 2020 and given orally at hearing. Mr Gracie disputes the refusal of the delegate to exercise the discretion on compassionate grounds. Mr Gracie gave evidence he is recovering from lymphoma and prostate removal due to cancer. Mr Gracie is not presently employed while he recovers. He has modest savings. His health issues and his financial situation restrict the ability of his wife to continue to visit China.
40. The Tribunal accepts Ms Dong's and Mr Gracie's evidence that she is an Australian permanent resident and he is an Australian citizen. The Tribunal accepts Ms Dong's desire to be reunited with her son, the emotional conflict experienced by Ms Dong, and the constrained financial circumstances of Ms Dong and Mr Gracie make it difficult for them to freely travel to China and are compassionate circumstances affecting Ms Dong and Mr Gracie.

Is the grant of the visa justified?

41. Mr Cui gave oral evidence he no longer studies and commenced work at the end of 2017. He lives by himself. He is 25 years old, is single and has no children. Ms Dong told the Tribunal Mr Cui stopped studying following the visa refusal because she and Mr Gracie could no longer afford to provide him with financial support.
42. Having regard to the compassionate circumstances affecting Ms Dong and Ms Gracie, the Tribunal is not satisfied those compassionate circumstances are at such a level to justify the grant of the visa.
43. Therefore the requirements of PIC 4020(1) should not be waived.
44. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.101.223.
45. For the reasons above, the criteria for the grant of a Subclass 101 visa are not met. There have been no claims advanced in respect of the other visa subclasses in Class AH (Subclass 102 and Subclass 117).

DECISION

46. The Tribunal affirms the decision not to grant the visa applicant a Child (Migrant) (Class AH) visa.

P. Maishman
Member